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POSSIBLE FEATURES OF A PROTOCOL OR ANOTHER LEGAL INSTRUMENT

Institutional issues

Note by the secretariat

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I. INTRODUCTION

A. Mandate

1. At its second session, the Ad Hoc Group on the Berlin Mandate (AGBM) requested the secretariat "to examine how institutions and processes established by the Convention could be linked to a future protocol or another legal instrument ... ". In its preliminary discussion of this matter, the AGBM identified a number of issues that may need to be taken into consideration, including institutional linkages between the Convention and a protocol or another legal instrument; the role of the secretariat; reviews of commitments of Annex I Parties, reporting and review mechanisms; subsidiary bodies; the use of annexes, and the need to avoid duplication and overlap (FCCC/AGBM/1995/7, para. 49). Also at its second session, the AGBM requested a more detailed report on these issues, including a review of existing relevant conventions, for its consideration at its fourth session (FCCC/AGBM/1995/7, para. 52).

B. Scope of the note

2. Pursuant to the above mandate, this first note gives a preliminary overview of some of the general institutional issues and questions arising from the possible adoption of either a protocol or an amendment to the Convention.[1] The annex to this note lists some of the procedural distinctions between a protocol and an amendment. The note does not address instruments of a quasi-legal, or 'soft law,' nature that could be considered for adoption by the COP, for example, decisions, resolutions and declarations, and guidelines; nor does it address the option of a completely separate legal instrument.

3. Parties will need to consider which type of instrument would be most viable in the current context - a protocol or an amendment or another legal or quasi-legal instrument. The institutional mechanisms will largely depend on the choice of instrument and the type of substantive commitments it will contain. The consequential choices between the establishment of new institutions and the adaptation of existing ones, established by and under the Convention, will also need to be addressed as the negotiations progress. This note assumes that Parties, in the interest of administrative efficiency and in the light of budgetary constraints, would prefer to avoid the establishment of new institutions in a protocol regime unless essential.

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[1] Parties may also wish to review the discussion on institutional issues raised by Parties and summarized in paragraph 32 of the annex to document A/AC.237/65 on Matters relating to commitments: review of the adequacy of commitments in Article 4, paragraph 2 (a) and (b), prepared for the tenth session of the Intergovernmental Negotiating Committee. At that session several countries stressed the need for "coherence between the Convention and any amendments and protocols."

C. Possible action by the Ad Hoc Group on the Berlin Mandate

4. The AGBM may wish to undertake a preliminary discussion on this item. More detailed consideration of the institutional arrangements and linkages between the Convention and a protocol or another legal instrument could await the completion of the report which is being prepared for consideration at the fourth session of the AGBM. The AGBM may wish to give guidance on the approach to be followed in that report. It may also be able to reach initial conclusions on certain institutional principles (for example, concerning its preference for either the establishment of new institutions or the use of Convention bodies).

II. REVIEW OF INSTITUTIONS AND PROCESSES ESTABLISHED UNDER THE CONVENTION AND THEIR POSSIBLE RELATIONSHIP TO A PROTOCOL OR AN AMENDMENT

5. This section identifies the institutions and processes established under the Convention and examines the role that each may play in either a protocol or an amended Convention. It may be useful, when considering the institutional linkages between the Convention and a protocol or an amendment, to distinguish between those institutions that have clear decision-making functions and those having advisory or support functions. Clearly the ultimate decision-making authority under a protocol rests with the Parties thereto. However, Convention institutions having advisory functions, notably subsidiary bodies established under and by the Convention, could, if desired, serve the needs of a protocol, thereby avoiding the establishment of new institutions. Similarly, the Convention secretariat could be mandated to support a protocol. In the case of an amendment, the present Convention institutions, including the secretariat, would serve an amendment regime, although some adjustment to their mandates may be needed.

6. The institutions, process and procedures established under the Convention may be identified as the following:

(a) Conference of the Parties (Article 7)
(b) Secretariat (Article 8)
(c) Subsidiary Body for Scientific and Technological Advice (Article 9)
(d) Subsidiary Body for Implementation (Article 10)
(e) Financial mechanism (Article 11)
(f) Communication of information related to implementation (Article 12)
(g) Multilateral consultative process (Article 13) (under consideration)
(h) Dispute settlement procedures (Article 14)
(i) Rules of procedure (currently applied with the exception of rule 42) and financial procedures (decision 15/CP.1)

A. Conference of the Parties

7. The COP is the supreme body of the Convention and is the ultimate decision-making authority. It is assumed that in a protocol regime a separate Conference (or Meeting) of the Parties would be established. In this regard, Article 17.5 of the Convention provides that decisions under any protocol shall be taken only by the Parties to the protocol concerned.

8. Two main issues emerge: the scheduling of meetings and the maintenance of policy coherence. With regard to the former, Parties to the Convention and to a protocol could decide to hold their sessions jointly or concurrently. (See the Montreal Protocol on Substances that Deplete the Ozone Layer and the Sulphur Protocol to the Convention on Long-Range Transboundary Air Pollution. Meetings of the Parties are held yearly and in conjunction with the Conferences of the Parties of the "parent" conventions when they meet in the same year.)

9. The second issue, namely, how substantive and procedural decisions taken by two separate Conferences of the Parties would be coordinated to ensure coherence, is more challenging. Presumably the protocol would be drafted in such a way as to promote this objective. The two Bureaux could also have an important role to play in this regard. The AGBM may wish to explore additional options.

10. With respect to amendments adopted by the COP, two separate regimes could be in effect: the current Convention regime, which all Parties have ratified or acceded to, and the amendment regime, which could have fewer Parties than the Convention. Presumably decisions pertaining to the amended provisions would be taken only by those Parties having "accepted" the amendments. The issue of maintaining coherence between decisions by different groups of Parties may also need to be addressed.

B. Secretariat

11. The work programme of the Convention secretariat could be expanded to serve a protocol regime or an amendment regime. The functions of the secretariat are laid down in Article 8.2 of the Convention, paragraph (g) of which provides scope for the expansion of these functions by stating that [the secretariat] shall "perform the other secretariat functions specified in the Convention and in any of its protocols and such other functions as may be determined by the Conference of the Parties."

C. Subsidiary bodies established by the Convention

12. Parties would need to consider what roles the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI) would play in a protocol or an amendment regime. With regard to the SBSTA, Article 9.3 states that "the functions and terms of reference of this body may be further elaborated by the Conference of the Parties." Article 10 contains no such provision with regard to the SBI; however, the COP, pursuant to Article 7.2 "shall keep under regular review the implementation of the Convention and any related legal instrument ... and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention." In addition, Article 7.2 (g) provides that the COP shall "make recommendations on any matters necessary for the implementation of the Convention".

13. The main function of the SBSTA is "to provide the Conference of the Parties and, as appropriate, its other subsidiary bodies with timely information and advice on scientific and technological matters relating to the Convention" (Article 9.1). These functions could be adapted to support the needs of a protocol or an amendment regime. Alternatively, the existing SBSTA could be requested, or mandated, to provide advice to the Parties to a protocol. Parties would need to consider whether questions of implementation relating to a protocol would best be handled by the SBI or by a separate subsidiary body established by the protocol.

14. If the SBSTA and/or the SBI were to support a protocol regime, issues relating to, inter alia, membership, election of officers, Bureaus, and decision-making procedures could arise. The AGBM may wish to consider how these might be addressed. If a protocol were to establish its own independent subsidiary bodies, a different type of issue would need to be considered, for example, the implications for the work programmes of the SBSTA and the SBI, coordination between the different regimes and resource requirements for the Convention and individual Parties to support such an arrangement.

D. Financial mechanism

15. The discussions on continuing to advance the implementation of Article 4.1 (see decision 1/CP.1, para. 3 (b)[2]) may have implications for the operation of the financial mechanism of the Convention. For example, in a protocol regime, Parties would need to consider whether any relevant provisions therein would need to be linked to the financial mechanism under the Convention. Parties may also need to consider whether,

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[2] For decisions adopted by the Conference of the Parties at its first session, see document FCCC/CP/1995/7/Add.1.

in a protocol or an amendment regime, the implementation of the Convention provisions relating to the financial mechanism (for example, the guidance to the operating entity) would need to take into account any relevant new circumstances arising from the instrument.

E. Communication of information

16. The communication and review of information is likely to continue to be an important feature under either a protocol or an amendment. At the same time, the existing provisions of the Convention (see Article 4.1(j) and Article 12) will, presumably, continue to apply. Subsequent COP decisions, (decisions 2/CP.1, 3/CP.1, and 4/CP.1) would need to be reviewed in the light of a protocol or an amendment. In a protocol regime, in order to ensure coherence and avoid duplication, Parties could integrate reporting and review procedures with those already established under Article 12 of the Convention. Conversely, if Parties to a protocol were to find it necessary to establish new and separate arrangements in this regard, they would need to consider carefully what would be the implications for the existing communication and review process. In an amendment regime, Parties may need to consider how the present process should be restructured and/or strengthened.

F. Multilateral consultative process

17. Parties to the Convention have only recently begun their discussions on the possible establishment of a multilateral consultative process pursuant to Article 13 and also to decision 20/CP.1 under which the Ad Hoc Group on Article 13 (AG13) was established with the mandate "to study all issues relating to the establishment of a multilateral consultative process and its design" and "to report its findings to the Conference of the Parties at its second session." The AG13 held its first session in October 1995 and concluded that there was a need for careful and detailed examination of all issues relating to the establishment of such a process. It was concluded that this work would take considerable time and would extend beyond COP 2 (FCCC/AG13/1995/2, para. 16).

18. Although the work of the AG13 will largely concentrate on the possible establishment of a multilateral consultative process under the present Convention, it is clear from the discussions so far that consideration will need to be given to the relationship between such a process and a protocol. In this regard, one of the questions which will need to be addressed in due course by the AGBM, rather than by the AG13, is whether a protocol should include a multilateral consultative process to handle questions of implementation relating thereto and, if so, whether the protocol should rely on a multilateral consultative process which may be established under the Convention or seek to develop a separate process. It is assumed, in this note, that if a multilateral consultative process were to be established by the Convention, it would serve (perhaps in an adapted manner) in an amendment regime.

G. Dispute settlement procedures

19. Article 14.8 of the Convention states that "the provisions of this Article shall apply to any related legal instrument which the Conference of the Parties may adopt, unless the instrument provides otherwise." In consequence, Parties will need to consider whether a protocol should provide for a bilateral dispute settlement procedure that is independent from the Convention. In the case of the Montreal and Sulphur Protocols, the dispute settlement procedures laid down in the respective "parent" conventions are applicable. It is assumed that in an amendment regime, Article 14 could be invoked by those Parties that have "accepted" the amendment, since the amendment regime would fall within the purview of the Convention as a whole.

H. Rules of procedure and financial procedures

20. The Parties to a protocol could decide to develop their own rules of procedure and financial procedures or to apply, mutatis mutandis, the rules of procedure and financial procedures of the Convention. In the latter case, some attention would need to be given to the manner in which budgetary and financial accountability would be ensured. Parties to a protocol or an amendment would pay contributions additional to their Convention contributions. Moreover, certain rules of procedure (for example, with regard to voting) and certain financial procedures would require revision.

21. It is important to note that the servicing of a protocol regime or an amendment regime would have financial and budgetary implications relating to additional meetings, funding for participation, and expanded secretariat work programmes. However, it may be possible to reduce such costs through the use of existing institutions where possible and rigorous efforts to ensure coordination and avoid overlapping and duplication.

III. OTHER ISSUES

22. In addition to the institutional concerns enumerated in this paper, Parties may, in formulating a protocol or another legal instrument, wish to consider several procedural issues. These would be particularly pertinent in relation to the adoption of a protocol which, unlike an amendment, may need to establish, inter alia, its own procedures for amendment, adoption and amendment of annexes, ratification, and entry into force, in addition to separate voting majorities and certain rules of procedure. Parties would also need to give consideration to the final clauses of a protocol, such as provisions governing depositary functions, signature, reservations, withdrawal, and the authenticity of texts. In a protocol, many of these provisions could provide for cross application to the relevant provisions of the Convention except in cases where it may be deemed necessary to establish separate procedures.

Annex

PROCEDURES RELATING TO A PROTOCOL AND AN AMENDMENT

	PROTOCOL	AMENDMENT
1.	May be adopted at any ordinary session of COP. (Article 17.1)	May be adopted at an ordinary session of COP. (Article 15.2)
2.	Text of proposed protocol to be communicated to Parties by the secretariat at least six months before such session. (Article 17.2)	Text of proposed amendment to be communicated by secretariat at least six months before meeting at which it is proposed for adoption. (Article 15.2)
3.	Draft rules of procedure provide for protocol to be adopted by [consensus] [2/3] [3/4] majority vote of Parties present and voting. (Draft rule 42)	May be adopted by consensus, last resort three-fourths majority vote of Parties present and voting. (Article 15.3)
4.	Entry into force requirement to be established by protocol (Article 17.3). Only Parties to the Convention may be Parties to the Protocol (Article 17.4).	Entry into force on 90th day after the date of receipt by Depositary of at least 3/4 of the Parties to the Convention. Amendment enters into force only for those Parties having accepted it. (Article 15.4)
5.	Protocol establishes separate regime from Convention	Since not all Parties to the Convention will necessarily ratify the amendment, it may create two regimes within the Convention.
6.	Protocol may need to establish separate procedures (e.g. rules of procedure, voting).	Convention may need revised procedures to govern amendment regime (e.g. rules of procedure, voting).
7.	Separate Conference or Meeting of the Parties for the Protocol?	Existing Conference of the Parties would be able to serve amended regime.
8.	Protocol may need to establish some separate institutions and subsidiary bodies.	Convention institutions may accommodate amendment regime.
9.	Protocol regime would not change Convention provisions.	Amended regime could require consequential changes to other provisions of the Convention.

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